

AMENDED IN SENATE JUNE 17, 2010

AMENDED IN ASSEMBLY APRIL 8, 2010

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL

No. 2627

Introduced by Assembly Member Nielsen

February 19, 2010

~~An act to amend Section 999.2 of the Military and Veterans Code, relating to veterans. An act to amend Sections 10115.1, 10115.4, 10115.10, and 10115.15 of the Public Contract Code, relating to state contracts.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 2627, as amended, Nielsen. ~~Veterans: contracts: disabled veteran business enterprises. State contracts: participation goals.~~

Existing law establishes participation goals for certain state contracts with minority business enterprises, women business enterprises, and disabled veteran business enterprises. These provisions, with respect to minority and women business enterprises, were held unconstitutional on the basis of not meeting equal protection requirements.

The bill would also revise the requirements imposed on disabled veteran business enterprises to, among other changes, require a disabled veteran to have at least a 10% service-connected disability and require a disabled veteran business enterprise to submit specified income tax information to the Office of Small Business and Disabled Veteran Business Enterprise Services.

Existing law further requires an awarding state department for contracts for materials, supplies, or equipment to accept the submission by a bidder of a minority, women, or disabled veteran business

enterprise utilization plan that has been approved prior to the solicitation due date by the Department of General Services in accordance with certain criteria.

This bill would revise the minimum criteria for a business utilization plan to be approved by the Department of General Services, as specified. The bill would also expand the types of contracts to which these provisions apply to include contracts for commodities, property, goods, professional services, construction work, or equipment, including information technology goods and services.

~~Under existing law, any state governmental entity that awards contracts for construction and certain related purposes has annual statewide participation goals of not less than 3% for disabled veteran business enterprises, as defined. For purposes of these provisions, existing law defines a “disabled veteran” as a veteran, as specified, with a service-connected disability who is a resident of the state.~~

~~Existing law deems any disabled veteran business enterprise that rents equipment to an awarding department to be an equipment broker, as defined, unless one or more certified disabled veterans have 51% ownership of the equipment and evidence is submitted in support of that fact.~~

~~This bill would also deem a disabled veteran business enterprise that rents equipment to a contractor to be an equipment broker, as specified. The bill would also revise various related definitions pursuant to those provisions, including “broker” or “agent,” “equipment,” and “equipment broker.”~~

~~Existing law also prohibits state funds expended for equipment rented from equipment brokers, as specified, from being credited toward the 3% goal.~~

~~This bill would instead require the broker’s commission fees of state funds expended through a broker or equipment broker to be credited toward the participation goals as established for disabled veteran business enterprises.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 10115.1 of the Public Contract Code is
- 2 amended to read:
- 3 10115.1. As used in this article, the following definitions apply:

1 (a) "Awarding department" means any state agency, department,
2 governmental entity, or other officer or entity empowered by law
3 to enter into contracts on behalf of the State of California.

4 (b) "Contract" includes any agreement or joint development
5 agreement to provide labor, services, material, supplies, or
6 equipment in the performance of a contract, franchise, concession,
7 or lease granted, let, or awarded for and on behalf of the State of
8 California.

9 (c) "Contractor" means any person or persons, regardless of
10 race, color, sex, ethnic origin or ancestry, or any firm, partnership,
11 corporation, or combination thereof, whether or not a minority or
12 women business enterprise, who submits a bid and enters into a
13 contract with a representative of a state agency, department,
14 governmental entity, or other officer empowered by law to enter
15 into contracts on behalf of the State of California.

16 (d) *"Disabled veteran" means a veteran of the United States*
17 *military, naval, or air service who has a service-connected*
18 *disability of at least 10 percent or more and who is domiciled in*
19 *this state.*

20 (e) *"Disabled veteran business enterprise" means a business*
21 *that meets all of the following criteria:*

22 (1) *The business is at least 51 percent owned by one or more*
23 *disabled veterans, except that if the business is a limited liability*
24 *company, it is wholly owned by one or more disabled veterans.*

25 (2) *The daily business operations are managed and controlled*
26 *by one or more disabled veterans. For purposes of this paragraph,*
27 *the disabled veteran who manages and controls the business is*
28 *not required to be the owner of the disabled veteran business*
29 *enterprise.*

30 (3) *The home office of the business is located in the United*
31 *States and is not a branch or subsidiary of a foreign corporation,*
32 *foreign firm, or other foreign-based business.*

33 (4) *The business has submitted the following income tax*
34 *information, as applicable, to the Office of Small Business and*
35 *Disabled Veteran Business Enterprise Services:*

36 (A) *Complete copies of its federal income tax returns for the*
37 *previous year after initial approval by the Department of General*
38 *Services. If in operation for less than three years, the business*
39 *shall submit its federal income tax returns for each year that it*
40 *has operated as a business.*

1 (B) A business that is not a sole proprietorship and rents
2 equipment to the state shall provide its federal income tax returns
3 for each disabled veteran owner or the firm shall be deemed to be
4 an equipment broker.

5 ~~(d)~~

6 (f) “Minority,” for purposes of this section, means a citizen or
7 lawful permanent resident of the United States who is an ethnic
8 person of color and who is: Black (a person having origins in any
9 of the Black racial groups of Africa); Hispanic (a person of
10 Mexican, Puerto Rican, Cuban, Central or South American, or
11 other Spanish or Portuguese culture or origin regardless of race);
12 Native American (an American Indian, Eskimo, Aleut, or Native
13 Hawaiian); Pacific-Asian (a person whose origins are from Japan,
14 China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines,
15 Samoa, Guam, or the United States Trust Territories of the Pacific
16 including the Northern Marianas); Asian-Indian (a person whose
17 origins are from India, Pakistan, or Bangladesh); or any other group
18 of natural persons identified as minorities in the respective project
19 specifications of an awarding department or participating local
20 agency.

21 (g) “Minority business enterprise” means a business concern
22 that meets all of the following criteria:

23 (1) The business is an individual proprietorship, partnership,
24 corporation, or joint venture at least 51 percent owned by one or
25 more minorities or, in the case of any business whose stock is
26 publicly held, at least 51 percent of the stock is owned by one or
27 more minorities.

28 (2) A business whose management and daily operations are
29 controlled by one or more minorities who own the business.

30 (3) A business concern with its home office located in the United
31 States which is not a branch or subsidiary of a foreign corporation,
32 firm, or other business.

33 ~~(f)~~

34 (h) “Women business enterprise” means a business concern that
35 meets all of the following criteria:

36 (1) The business is an individual proprietorship, partnership,
37 corporation, or joint venture at least 51 percent owned by one or
38 more women or, in the case of any business whose stock is publicly
39 held, at least 51 percent of the stock is owned by one or more
40 women.

1 (2) A business whose management and daily operations are
2 controlled by one or more women who own the business.

3 (3) A business concern with its home office located in the United
4 States which is not a branch or subsidiary of a foreign corporation,
5 firm, or other business.

6 ~~(g)~~

7 (i) “Goal” means a numerically expressed objective that
8 awarding departments and contractors are required to make efforts
9 to achieve.

10 SEC. 2. Section 10115.4 of the Public Contract Code is
11 amended to read:

12 10115.4. In implementing this article, the awarding department
13 shall utilize existing resources such as the Office of Small-~~and~~
14 ~~Minority~~ Business and Disabled Veteran Business Enterprise
15 Services, the federal Minority Business Development Agency, and
16 the federal Small Business Administration.

17 SEC. 3. Section 10115.10 of the Public Contract Code is
18 amended to read:

19 10115.10. (a) It shall be unlawful for a person or firm to:

20 (1) Knowingly and with intent to defraud, fraudulently obtain,
21 retain, attempt to obtain or retain, or aid another in fraudulently
22 obtaining or retaining or attempting to obtain or retain, acceptance
23 or certification as a minority, women, or disabled veteran business
24 enterprise, for the purposes of this article.

25 (2) Willfully and knowingly make a false statement with the
26 intent to defraud, whether by affidavit, report, or other
27 representation, to a state official or employee for the purpose of
28 influencing the acceptance or certification or denial of acceptance
29 or certification of any entity as a minority, women, or disabled
30 veteran business enterprise.

31 (3) Willfully and knowingly obstruct, impede, or attempt to
32 obstruct or impede, any state official or employee who is
33 investigating the qualifications of a business entity which has
34 requested acceptance or certification as a minority, women, or
35 disabled veteran business enterprise.

36 (4) Knowingly and with intent to defraud, fraudulently obtain,
37 attempt to obtain, or aid another person or firm in fraudulently
38 obtaining or attempting to obtain, public moneys to which the
39 person is not entitled under this article.

(5) Establish, or cooperate in the establishment of, or exercise control over, a firm found to have violated any of paragraphs (1) to (4), inclusive. Any person or firm who violates this paragraph is guilty of a misdemeanor and shall be liable for a civil penalty not to exceed fifty thousand dollars (\$50,000) for the first violation, and a civil penalty not to exceed two hundred thousand dollars (\$200,000) for each additional, or subsequent violation.

(6) This section shall not apply to minority and women business enterprise programs conducted by public utility companies pursuant to the California Public Utilities Commission's General Order 156.

(b) Any person who violates paragraphs (1) to (4), inclusive, of subdivision (a) is guilty of a misdemeanor and shall be liable for a civil penalty not to exceed five thousand dollars (\$5,000) for the first violation, and a civil penalty not to exceed twenty thousand dollars (\$20,000) for each additional or subsequent violation.

(c) Any person or firm that violates subdivision (a) shall, in addition to the penalties provided for in subdivision (b), be suspended from bidding on, or participating as either a contractor, subcontractor, or supplier in, any state contract or project for a period of not less than 30 days ~~nor~~ and not more than one year. However, for an additional or subsequent violation the period of suspension shall be extended for a period of up to three years. Any person or firm that fails to satisfy the penalties imposed pursuant to subdivisions (b) and (c) shall be prohibited from further contracting with the state until the penalties are satisfied.

(d) The awarding department shall report all alleged violations of this section to the Office of Small- and Minority Business and Disabled Veteran Business Enterprise Services. ~~The office~~ *Office of Small Business and Disabled Veteran Business Enterprise Services* shall subsequently report all alleged violations to the Attorney General who shall determine whether to bring a civil action against any person or firm for violation of this section.

(e) ~~The office~~ *Office of Small Business and Disabled Veteran Business Enterprise Services* shall monitor the status of all reported violations and shall maintain and make available to all state departments a central listing of all firms and persons who have been determined to have committed violations resulting in suspension.

(f) No awarding department shall enter into any contract with any person or firm suspended for violating this section during the

1 period of the person's or firm's suspension. No awarding
2 department shall award a contract to any contractor utilizing the
3 services of any person or firm as a subcontractor suspended for
4 violating this section during the period of the person's or firm's
5 suspension.

6 (g) The awarding department shall check the central listing
7 provided by the office to verify that the person, firm, or contractor
8 to whom the contract is being awarded, or any person or firm being
9 utilized as a subcontractor by that person, firm, or contractor, is
10 not under suspension for violating this section.

11 *SEC. 4. Section 10115.15 of the Public Contract Code is*
12 *amended to read:*

13 10115.15. (a) Notwithstanding Section 10115.2, when
14 awarding contracts for *commodities, materials, property, goods,*
15 *supplies, professional services, construction work, or equipment,*
16 *including electronic data processing information technology goods*
17 *and services,* an awarding department shall accept the submission
18 by a bidder of a minority, women, and disabled veteran business
19 enterprise utilization plan that has been approved prior to the
20 solicitation due date by the Department of General Services. A
21 business utilization plan shall be considered approved by the
22 Department of General Services as of the date submitted to the
23 department so long as the plan meets the minimum criteria
24 established in paragraphs (1) to ~~(12)~~ (11), inclusive, and shall be
25 valid for a period of one year, unless the department has audited
26 the utilization plan, as authorized under subdivision (b), and
27 disapproves it for reasons specified under subdivision (c). The
28 decision of whether to establish a minority, women, and disabled
29 veteran business enterprise utilization plan shall be at the option
30 of the vendor. If a bidder cites an approved utilization plan in
31 response to the minority, women, and disabled veteran business
32 enterprise participation requirements of a solicitation that calls for
33 15 percent minority-owned, 5 percent women-owned, and 3 percent
34 disabled veteran-owned business participation, then that utilization
35 plan shall be considered responsive to the participation goals of
36 the solicitation document. If a solicitation specifies higher
37 participation goals than those in the bidder's utilization plan, the
38 bidder shall meet the goals in the solicitation *or submit an*
39 *amendment to increase the percentage of specified goals.* At a

1 minimum, the utilization plan shall include the following
2 information:

3 (1) A statement of the vendor's minority, women, and disabled
4 veteran business enterprise utilization plan, including the primary
5 objectives of the utilization plan.

6 (2) ~~An~~ *If applicable, an* explanation showing sufficient business
7 reasons why the vendor did not meet minority, women, and
8 disabled veteran business enterprise participation goals set forth
9 in the vendor's minority, women, and disabled veteran business
10 utilization plan submitted to, and approved by, the Department of
11 General Services in the previous year, ~~if applicable~~. Further, if the
12 vendor did not meet the minority, women, and disabled veteran
13 business participation goals in the previous year, the vendor shall
14 also identify remedial steps it will take to meet the goals in the
15 current utilization plan.

16 (3) A statement of the vendor's minority, women, and disabled
17 veteran business utilization goals for the succeeding year. At a
18 minimum, these utilization goals shall be equal to the statewide
19 participation goals set forth in subdivision (c) of Section 10115.

20 (4) Estimated total dollars to be ~~subcontracted~~ *contracted* by
21 the vendor ~~for sales within the United States for the succeeding~~
22 ~~year with the State of California.~~

23 (5) ~~Estimated total dollars to be subcontracted by the vendor~~
24 ~~for sales within the State of California for the succeeding year.~~

25 (6)
26 (5) Total dollars, expressed as a percentage of the amount
27 estimated pursuant to paragraph (4), intended to be subcontracted
28 with each of the following:

29 (A) Minority business enterprises.

30 (B) Women business enterprises.

31 (C) *Disabled veteran business enterprise.*

32 (7) ~~Total dollars, expressed as a percentage of the amount~~
33 ~~estimated pursuant to paragraph (5), intended to be subcontracted~~
34 ~~with disabled veteran-owned business enterprises.~~

35 (8)
36 (6) A representative listing of the products and services that the
37 vendor anticipates subcontracting, including ~~an~~ *direct and indirect*
38 *funding. An* identification of the types of subcontracting *and*
39 *overhead costs* planned for minority, women, and disabled veteran
40 business enterprises.

1 (7) *Direct and indirect costs, as related to disabled veteran*
2 *business enterprise participation, may be applied to business*
3 *utilization plan goals. For purposes of this paragraph:*

4 (A) *“Direct subcontract awards” are subcontracts that are*
5 *directly attributable to a specific state contract.*

6 (B) *“Indirect costs” are those which, because incurred for*
7 *common or joint purposes, are not directly related to a specific*
8 *contract. These indirect costs include, but are not limited to,*
9 *overhead, general, and administrative costs, such as employee*
10 *fringe benefits, health insurance, retirement contributions,*
11 *janitorial expenses, office supplies, landscaping, travel costs,*
12 *accounting, and security costs. These indirect costs shall not be*
13 *used for services and commodities of any direct subcontract award.*

14 ~~(9)~~

15 (8) The name of the individual employed by the vendor who
16 will administer the vendor’s utilization plan, including a description
17 of the duties of the individual.

18 ~~(10)~~

19 (9) A description of the efforts that the vendor will undertake
20 to ensure that minority, women, and disabled veteran business
21 enterprises will have an equitable opportunity to compete for
22 contracts.

23 ~~(11)~~

24 (10) A listing of the records and reports that the vendor will
25 maintain to demonstrate the practices and procedures that have
26 been adopted to comply with the requirements and goals of the
27 utilization plan.

28 ~~(12)~~

29 (11) Affirmation that the vendor met the statewide minority,
30 women, and disabled veteran business enterprise utilization goals
31 for the previous year, if applicable.

32 (b) The Department of General Services shall conduct random
33 audits of the submitted *business* utilization plans to determine
34 compliance with this article, and shall retain on file all submitted
35 *business* utilization plans for auditing purposes. During any audit
36 of a submitted *business* utilization plan, the Department of General
37 Services may ask a vendor to submit a list of all the minority,
38 women, and disabled veteran business enterprises included as
39 subcontractors in the vendor’s *business utilization* plan for the
40 previous year. This information shall remain confidential. Nothing

1 in this section shall be construed to require the Department of
2 General Services to audit all of the minority, women, and disabled
3 veteran business enterprise utilization plans submitted by individual
4 vendors. The Department of General Services may establish
5 appropriate fees to cover the actual costs of conducting random
6 audits and retaining on file all submitted plans.

7 (c) (1) At any time, the Department of General Services may
8 disapprove a vendor's minority, women, and disabled veteran
9 business enterprise utilization plan for any of the following reasons:

10 (A) The *business* utilization plan fails to evidence a vendor's
11 intention to comply fully with the statewide minority, women, and
12 disabled veteran business enterprise goals for the succeeding year,
13 as indicated by failure of the *business* utilization plan to contain
14 the information specified in subdivision (a).

15 (B) The *business* utilization plan fails to evidence sufficient
16 business reasons for failure to achieve the minority, women, and
17 disabled veteran business enterprise goals set forth in a *business*
18 utilization plan submitted in the previous year, if applicable.

19 (C) The *business* utilization plan fails to evidence sufficient
20 remedial steps the vendor will take if the vendor did not meet the
21 minority, women, and disabled veteran business participation goals
22 in the previous year, if applicable.

23 (2) If a vendor's *business* utilization plan is disapproved, the
24 vendor may not submit a new *business* utilization plan to the
25 department for a period of one year from the date of disapproval.
26 Prior to disapproval of a vendor's *business* utilization plan, the
27 vendor shall be entitled to a public hearing and to five days' notice
28 of the time and place thereof. The notice shall state the reasons for
29 the hearing.

30 (3) A vendor that submits a minority, women, and disabled
31 veteran business utilization plan that is approved by the Department
32 of General Services, and that is subsequently awarded a contract
33 to which the vendor would not otherwise have been entitled, and
34 ~~who~~ *that* fails to evidence intention to fully comply with the
35 minority, women, and disabled veteran business enterprise goals
36 in the *business* utilization plan, or fails to evidence sufficient
37 business reasons for failing to achieve the minority, women, and
38 disabled veteran business enterprise goals set forth in the *business*
39 utilization plan, shall:

1 (A) Pay to the state any difference between the contract amount
2 and what the state's cost would have been if the contract had been
3 properly awarded.

4 (B) In addition to the amount specified in subparagraph (A), be
5 assessed a penalty in an amount of not more than 10 percent of
6 the amount of the contract involved.

7 (C) Be ineligible to transact any business with the state for a
8 period of not less than three months and not more than 24 months.

9 Prior to imposition of any sanction under this chapter, the
10 contractor or vendor shall be entitled to a public hearing and to
11 five days' notice of the time and place thereof. The notice shall
12 state the reasons for the hearing.

13 ~~SECTION 1. Section 999.2 of the Military and Veterans Code~~
14 ~~is amended to read:~~

15 ~~999.2. (a) Notwithstanding any other provision of law,~~
16 ~~contracts awarded by any state agency, department, officer, or~~
17 ~~other state governmental entity, including school districts when~~
18 ~~they are expending state funds for construction, professional~~
19 ~~services (except those subject to Chapter 6 (commencing with~~
20 ~~Section 16850) of Part 3 of Division 4 of Title 2 of the Government~~
21 ~~Code), materials, supplies, equipment, alteration, repair, or~~
22 ~~improvement shall have statewide participation goals of not less~~
23 ~~than 3 percent for disabled veteran business enterprises. These~~
24 ~~goals apply to the overall dollar amount expended each year by~~
25 ~~the awarding department.~~

26 ~~(b) For purposes of this section:~~

27 ~~(1) "Broker" or "agent" means any individual, entity, contractor,~~
28 ~~or any combination thereof, that does not have title, possession,~~
29 ~~control, and risk of loss of materials, supplies, services, or~~
30 ~~equipment provided to an awarding department, unless one or~~
31 ~~more certified disabled veterans has 51 percent ownership of the~~
32 ~~quantity and value of the materials, supplies, services, and of each~~
33 ~~piece of equipment, materials, or supplies provided under the~~
34 ~~contract or subcontract.~~

35 ~~(2) "Equipment" means any piece of equipment that is used or~~
36 ~~provided for sale or rental to any state agency, department, officer,~~
37 ~~other state governmental entity, or contractor, including equipment~~
38 ~~for which operators are provided.~~

39 ~~(3) "Equipment broker" means any broker or agent who rents~~
40 ~~equipment to an awarding department or contractor.~~

~~(e) A disabled veteran business enterprise that rents equipment to an awarding department or contractor shall be deemed to be an equipment broker unless one or more disabled veterans has 51-percent ownership of the quantity and the value of each piece of equipment. If the equipment is owned by one or more disabled veterans, each disabled veteran owner, prior to performance under any contract or subcontract, shall submit to the awarding department a declaration signed by the disabled veteran owner stating that the owner is a disabled veteran and providing the name, address, telephone number, and tax identification number of the disabled veteran owner. Each disabled veteran owner shall submit his or her federal income tax returns to the administering agency pursuant to subdivision (g) as if he or she were a disabled veteran business enterprise. The disabled veteran business enterprise of a disabled veteran owner who fails to submit his or her tax returns will be deemed to be an equipment broker.~~

~~(d) A disabled veteran business enterprise that rents equipment to an awarding department or contractor shall, prior to performing the contract, submit to the awarding department a declaration signed by each disabled veteran owner and manager of the enterprise stating that the enterprise obtained the contract by representing that the enterprise was a disabled veteran business enterprise meeting and maintaining all of the requirements of a disabled veteran business enterprise. The declaration shall include the name, address, telephone number, and tax identification number of the owner of each piece of equipment identified in the contract.~~

~~(e) Of state funds expended through a broker or equipment broker, pursuant to contracts awarded under this section, the broker's commission fees only shall be credited toward the participation goals established for disabled veteran business enterprises.~~

~~(f) A disabled veteran business enterprise that is a broker or agent and that obtains a contract pursuant to subdivision (a) shall, prior to executing the contract, disclose to the awarding department or contractor that the business is a broker or agent. The disclosure shall be made in a declaration signed and executed by each disabled veteran owner and manager of the enterprise, declaring that the enterprise is a broker or agent, and identifying the name, address, and telephone number of the principal for whom the enterprise is acting as a broker or agent.~~

1 ~~(g) (1) A disabled veteran business enterprise, and each owner~~
2 ~~thereof, shall, at the time of certification, submit to the~~
3 ~~administering agency complete copies of the enterprise's federal~~
4 ~~income tax returns for the three previous tax years.~~

5 ~~(2) A disabled veteran business enterprise, and each owner~~
6 ~~thereof, shall submit to the administering agency complete copies~~
7 ~~of the enterprise's federal income tax returns that have a~~
8 ~~postcertification due date, on or before the due date, including~~
9 ~~extensions.~~

10 ~~(3) A disabled veteran business enterprise that, and each owner~~
11 ~~thereof who, has not submitted to the administering agency~~
12 ~~complete copies of the enterprise's federal income tax returns for~~
13 ~~the three tax years preceding certification nor for each~~
14 ~~postcertification tax year for which a return was required to be~~
15 ~~filed, shall have 90 days to submit those returns.~~

16 ~~(4) A disabled veteran business enterprise that fails to comply~~
17 ~~with any provision of this subdivision shall be prohibited from~~
18 ~~participating in any state contract until the disabled veteran~~
19 ~~business enterprise complies with the provisions of this subdivision.~~
20 ~~Funds expended involving a disabled veteran business enterprise~~
21 ~~during any period in which that enterprise is not in compliance~~
22 ~~with the provisions of this subdivision shall not be credited toward~~
23 ~~the awarding department's 3-percent goal.~~

24 ~~(h) A disabled veteran business enterprise that fails to maintain~~
25 ~~the certification requirements set forth in this article shall~~
26 ~~immediately notify the awarding department and the administering~~
27 ~~agency of that failure by filing a notice of failure that states with~~
28 ~~particularity each requirement the disabled veteran business~~
29 ~~enterprise has failed to maintain.~~